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THE
AMERICAN LAW REGISTER.

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LEGAL TENDER NOTES BEFORE THE SUPREME COURT.

THE recent discussion of the question of the validity of the Act of Congress creating the legal tender notes, before the Supreme Court of the United States, and the manner in which the question is viewed by the public in general, are certainly calculated to create, or perhaps we might more properly say to confirm, distrust in general public opinion, as an index or guide to truth. When the law was first passed it was regarded as evidence of disloyalty for any one to impugn the validity of that act. The class of men, considerably numerous, indeed, and highly respectable in point of character, learning, and ability, who did openly denounce the act as an unworthy debasement, or attempted debasement of the public money of the nation, was encountered and assailed from every portion of the country as disloyal and unpatriotic; and certain epithets which were regarded as derogatory, and specially efficient in producing opprobrium and discredit, were freely heaped upon them, without measure or stint. At the present time, however, all this seems to be changed. Every one seems to feel at liberty to discuss the question of the validity of the law with the utmost freedom. But what is most remarkable in this discussion is, that while the best lawyers and the most cautious and conservative men in the country now approach the question with obvious diffidence and distrust in their own power to comprehend all its bearings, or to give it a satisfactory determination, the poli-

ticians, and letter writers, and others of the class who spend much of their time, as the Athenians did in the days of St. Paul, in hearing or telling some new thing, and who are supposed to reflect pretty accurately the general, superficial political public sentiment of the country, for the day, or the hour, exhibit a most amazing amount of flippancy and readiness to relieve all the doubts and difficulties of their hearers and readers by their own single and simple *ipse dixit*. And so common is it, in and about the Capitol, and in the leading city journals, at the great commercial centres of the nation, to hear and read the unqualified opinion and declaration, that the court will declare the law invalid with all but unanimity, that one is led to seek the explanation of this surprising garrulity against the law in the very quarters where but lately was found such inquisitorial intolerance of all such opinion, in some source of light and intelligence quite beyond any developments disclosed in the argument. It almost seems as if the authors of the act would now be glad to escape responsibility by invoking the aid of the court in declaring it void. But the court will do no such thing, for any such reason.

We had the agreeable opportunity of listening to the arguments before the court through most of the sessions for three successive days, and it was certainly such an intellectual banquet as is very rarely exhibited in any forensic encounter. We do not care to venture upon any specific estimate of the particular excellencies of the successive advocates, where all were confessedly so able and so eloquent. We had listened to all the advocates, on other occasions, with the exception of Mr. Potter, of New York. The opening argument in favour of the validity of the law was made by Judge Curtis, in his clearest, purest, happiest vein, as nearly perfect, both in matter and manner, as it is possible for us to conceive a law argument to be. Mr. Townsend, of New York, and Mr. Potter occupied parts of two days in reply, placing the main force of the argument on the ground of the impolicy and injustice of the law, and upon the early history of the Government and the Constitution, as showing both the improbability that the Constitution was intended to receive any such construction, and, as far as practicable, the fact that such was not the purpose of its framers, or of those who adopted it. These gentlemen commanded a good degree of attention, and made themselves, on the whole, very interesting.

The Attorney-General, Mr. Evarts, closed the argument with his usual copiousness of learning and fulness of illustration.

The only possible exception one can make to his manner of arguing causes in banc is, that he is, if possible, too deliberate, causing the attention of the court, after listening a considerable time, to rather flag, and lose something of that keen edge which it is always desirable to maintain throughout, if possible. A certain degree of deliberation and quiet self-possession adds very greatly to the force of a mere dry legal argument before a bench of judges, especially where, as in the present case, they are considerably numerous. And we know that Daniel Webster sometimes adopted this peculiar mode of argument with great effect in addressing courts; and juries possibly sometimes, but not by any means as a general rule. And he could do some things, sometimes, which it would be scarcely safe for any other man to attempt. As his favorite brother, Ezekiel, once said of him, "Brother Daniel could puzzle" [or even overwhelm] "a great many men that knew more than he did." No American, probably, and no Englishman, perhaps, ever possessed the power of manner which Daniel Webster seemed unconsciously to fall, or be driven, into. What seemed in him the inspiration of the moment, or the result of the secret and hidden springs of the cause, might not always appear so in others, at least on occasions of no special interest.

But bating this single and unimportant drawback in the Attorney-General's mode of speaking (which we are specially desirous of seeing improved to the extent of the Latin maxim, *festina lente*, on account of our great admiration of the man), it must be admitted that he presents one of the best models of forensic eloquence at present to be found in this or perhaps any other country. Mr. Evarts' dry law arguments, while abounding in all the learning and logic which it is desirable to find there, abound also with the richest and choicest illustrations which it is possible to conceive, or which the purest and most chastened rhetorician could desire. And this alone makes it necessary to occupy more time than would otherwise be required, and thus imposes a somewhat greater strain upon the powers of the orator. The argument of Judge Curtis fell far within the limits of one hour, and it commanded the most undivided and unflinching attention to the last moment; and as a presentation of the legal argument, and

it aspired to nothing else, it was certainly of a most uncommon and unrivalled character.

But the general style of argument in this court is losing much of that conversational air which gave it such a charm thirty years ago, and which still prevails, to a great extent, in Westminster Hall. The present style of forensic debate there is more like that of Pinkney, and Emmett, and Lowndes, than the school that followed these great masters of forensic eloquence, which was far less ornate and discursive. Each has its advantages and its followers. But the present style of forensic debate in America is rather French than English, and is based, perhaps, somewhat upon Rufus Choate's theory, that if you would move the court and jury, you must first electrify the bystanders, and the audience generally.

But we are very far from any assurance that the ablest, and purest, and most learned courts, and the judges of this court possess all these qualities in an eminent degree, are sure to be most effectually convinced, upon a great constitutional question, by merely dry legal views. There was something so stirring in the many eloquent illustrations and appeals of the Attorney-General, that we could not but feel that very likely they would effect a lodgment in the sternest legal minds, where no force of pure cold logic could reach. We believe the ablest, and most experienced, and learned judges are more frequently induced to reconsider a over-established opinion, upon the force of a pertinent illustration, or an argument *ab inconvenienti*, or the *reductio ad absurdum*, than by any amount of mere deductive reasoning. But it is fair to say that, taking the pure legal view of Mr. Curtis, and the mixed legal and practical view of the Attorney-General, there was nothing more to be desired on that side.

The argument upon the other side was considerably weakened in its force, upon the general question of the validity of the legal tender clause in the act, by the fact that the validity of gold contracts, under the law, was also involved in the cases, and this of course caused considerable diversion and consequent loss of force upon the main issue. One of the speakers, too,—whose argument was in the main very able and happy,—we are bound to say fell into the common fault of diffuse and ready speakers generally, of loading his argument with an infinite number of illustrations, drawn from every source of supposed analogy, many of which were far more doubtful than the main proposition, thus dividing

attention of the court and dissipating the intrinsic force of his argument. Mr. Townsend, whose case was that of a gold contract, in terms, made a very close and learned argument, which we should be surprised to have overruled by the court, even if they maintain the entire validity of the act. Having spoken so much at length upon the argument in these cases, we shall be able to say less in regard to the questions involved than we had desired, or intended. But we shall present a brief *resumé* of the points, not much relied upon in the argument before the court, but which appear to us worthy of consideration.

The argument against the validity of the act seems to be placed largely upon the injustice and severity of its operation upon past transactions. This argument, as it seems to us, is completely answered by the consideration that the validity of an act of legislation does not, in any sense, depend upon its innate wisdom or justice. Where the power of legislation exists, it is equally operative, whether its exercise be wise or unwise, just or unjust. And the same injustice is confessedly within the power of Congress, in regard to the currency, by debasement of the metallic coinage as by issuing bills of credit. The Acts of Congress have more than once lowered the standard of the established coinage, and thus lessened the amount of standard gold or silver which subsisting contracts would require for their performance. And if this can be done in a small degree, it can equally be done to any extent which the government shall deem expedient, and thus effect the same depreciation complained of by making legal tender notes, so that this argument is thus effectually answered. It is a power which the National Legislature always possesses, and may exercise at will.

Again, much stress is often placed upon the historical fact that it was proposed in the convention framing the Constitution to give the express power to the National Government to issue bills of credit, and that this was not accepted, or, as it is called, was rejected. Now this is not by any means the same thing as if the power to make the Constitution had resided in the convention. It is not the same as if the proposition to emit bills of credit had been submitted to the people and rejected. The most that can fairly be argued from this fact is, that the convention could not agree to submit to the people any express provision to enable the National Government to issue bills of credit. If this

had been done, it must have been accepted in that form, or the whole Constitution would have been rejected. This might have been the prevailing reason which induced the convention not to embrace that specific provision in the frame of government submitted. It merely shows then, that, for some reason, the convention could not agree to submit that express provision.

But it by no means leaves the Constitution, as adopted, subject to any implications against the provision being virtually implied in what was submitted and adopted, because this express provision was not embraced in it. The people had no knowledge of the discussions of the convention, or of the propositions discussed by it and not embodied in the Constitution, but acted upon the document as presented to them; and it is therefore fairly entitled to receive its construction upon what appears in it, without reference to any discussions or propositions before the convention, and which did not result in any affirmative action. It is much like the case of a contract, since the passing of the Legal Tender Act, in which the parties, in their preliminary action, had attempted to define the currency, either gold or greenback, in which it should be payable, but could not agree, and therefore left it to legal implication. There would surely be no ground of argument, in such a case, that the parties had virtually fixed the currency in which payment should be made, or that because the parties failed to agree either upon gold or currency, both must be excluded. No principle of legal construction is more familiar, than that none of the preliminary negotiations can be received or considered in fixing the construction of the contract. And the same is true in regard to any written instrument, whether a contract, a testament, or a constitution. Each must speak by its own words, construed with reference to its subject-matter and the purpose of its creation.

If then the United States Constitution, like ordinary written instruments, is entitled to be construed by its language, with reference to those allowable aids to which resort is always made in such cases, we shall find less embarrassment in reaching a satisfactory conclusion than if we were compelled to regard the views of the framers or of the people, then or now, or any other outside influences, in the matter. No doubt tradition, or contemporary history, may, in many instances, afford great aid in learning the import of terms, or the general purpose and intent of an act or instrument, or contract.

In that view the known and declared facts recited in the preamble of the Constitution, wherein the transaction is declared to be the work or act of the people of the whole United States, is a very significant intimation that the purpose was to create a national sovereignty, and not a mere confederation among the states. The other portions of the preamble look in the same direction. "To form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity," are all objects not to be expected from any thing less than the establishment of a national and consolidated sovereignty.

Then the general frame of the instrument shows that the new government was expected to embrace all the important, certainly all the indispensable, powers and functions of national sovereignty, and that it was to be automatic, possessing all the functions and resources of sovereign states, viz., executive, legislative, and judicial.

As showing too the paramount and supreme power of the newly-created national government, the national judiciary is given the supreme function of defining and measuring all the national powers, and at the same time of defining and measuring the powers reserved to the several states under the National Constitution, by allowing writs of error to the highest judicial tribunal in the state from the Supreme Court of the nation in all matters affecting any power or function derived from or under any Act of Congress or the National Constitution, or where it was claimed that any conflict had arisen in regard to the validity of any state law by reason of its conflict with the powers and functions of the national government under its Constitution, and the decisions of the state court had been adverse to the national claim of authority.

Under such a distribution of the powers of sovereignty, it would be natural to find that the power of making money and declaring the value of the same should be reposed in the national government, as a clearly national function. This we do find to be the fact, either fully or subject to limitations. There can be no doubt that before creating the national sovereignty the general and unlimited power of making money, in all modes known to the law of free states, did exist in the fullest possible form in each of the

states. And although the history of free states shows, that for commercial purposes a circulating medium of the precious metals is regarded as the most desirable, and the only desirable one, yet it is certain this has never been regarded as the exclusive currency of even commercial states. Almost all the European states have, in emergencies of great pressure, during war or in other great commercial crises, resorted to the issue of national bills of credit, by declaring them part of the money or circulating medium of the country. This question was incidentally involved in a recent case in the English courts of equity, where the Emperor of Austria sought to enjoin Louis Kossuth and one Day, the manufacturers, from preparing and issuing bills of credit in the name of the kingdom, or the king, of Hungary. No question seems there seriously to have been made by counsel or entertained by the court but that such bills, when lawfully issued, would constitute a portion of the lawful money of the empire: *Emperor of Austria v. Kossuth et al.*, 7 Jur. N. S. 483, before V. C. STUART; s. c. before Court of Ch. Appeal, Id. 639; 2 Story Eq. Ju. § 951 *e.*

It is declared in *Craig v. State of Missouri*, 4 Pet. 410, and is a fact in history familiarly known, that the states, before the adoption of the Constitution, had repeatedly exercised the power of issuing bills of credit and declaring them lawful tender for private debts, that is, making them lawful money. The confederacy, before the adoption of the Constitution, possessed no power over the subject of lawful tender, and were compelled to, as they repeatedly did, appeal to the states to declare the national bills of credit lawful tender.

This was one of the defects in the national authority, which it was the purpose of the Constitution to remedy. This was done by prohibiting the states from coining money or issuing bills of credit, or making any thing but gold and silver a tender for private debts. This in effect took from the states all power over the subjects, both of making money and declaring legal tender. This seems to be so regarded by Ch. J. MARSHALL, in *Craig v. Missouri*, *supra*, where he shows very clearly that both these functions are prohibited to the states. This must be so if the states could neither coin money or issue bills of credit, since this covers the whole subject of tender laws. And accordingly we find that Congress has always controlled the subject of tender since the adoption of the Constitution, and the states have never attempted to interfere. This, of itself, is such a practical construction of the

Constitution as must, on every sound principle, be regarded as settling the respective powers of the nation and the states over the subject of tender laws.

We think it fair too to say, that the entire power of making money is, by the Constitution, given to Congress. We have seen that it existed before the formation of the national government in all the states, and that it is now prohibited to them all. It must therefore exist in Congress, or not at all. If it had been the purpose of the Constitution to prohibit the power of issuing bills of credit and making them lawful tender, equally to the national government as to the states, it is impossible to conjecture why it should not have been done in the same or similar terms. The fact that both are distinctly and expressly prohibited to the states, and that not one word is said in regard to their being exercised by the nation, is certainly a very significant intimation that it was not deemed proper to extend the prohibition beyond the states, but to leave its exercise by the nation to the necessities and emergencies of after times, to be exercised or not according to future exigencies, the same as it exists in all free and sovereign states.

This is very obviously to be inferred from the consideration that the whole subject of issuing bills of credit and making them lawful money was familiar to the delegates, in the then recent experience of the times, and especially must it have been present to their minds in making such express provisions in regard to its exercise by the states. It could not, therefore, have been supposed the national government would never have occasion to exercise such a power, since that had very recently been done by a national government possessing far less automatic power than the one then about to be created, upon the basis of paramount national sovereignty. Nor is it fair to conclude that it was then supposed there could never arise an emergency where it might be necessary to declare these bills of credit lawful tender or lawful money; since the nation had just had experience of that same necessity and had appealed to the states for the exercise of that same power, which they were now in express terms prohibiting them from exercising in future. And if it had been the purpose to extinguish and utterly abolish this power everywhere, we can conjecture no good reason why that should not have been done in terms, either by prohibiting all bills of credit as lawful

money, or else declaring, as in regard to the states, that Congress or the nation should never make anything but gold and silver a lawful tender for private debts. We must surely conclude either that it was intended to abolish this known and important function of government or else leave its exercise to the nation.

Whether, therefore, we look for this power in the clause "To borrow money on the credit of the United States," or that "To raise and support armies," which is evidently but a subdivision of the former, or whether we find it embraced under the liberal and only sensible construction of the power to "coin money, regulate the value thereof, and of foreign coin," is not very material. It must be obvious to all that an instrument creating a paramount national sovereignty, and prohibiting the exercise of all sovereign national functions, such as making money, by the states, should not, except upon strict necessity, resulting from the terms used, be so construed as to destroy or essentially abridge so important and indispensable a national function as the creation of paper currency upon great and pressing emergencies; a function exercised by all commercial states in those trying exigencies which, as in all past history, always have occurred, so in all future time must be expected to occur.

We only desire further to say that it seems to us that the courts and the profession have manifested more refinement than wisdom in giving the clause in the Constitution, "to coin money," such a precise and literal interpretation as to exclude all paper money under all circumstances. In its most literal sense it will extend to all kinds of metal, to iron and tin, as well as gold and silver, and perhaps also to every substance capable of receiving and retaining an impression, for coining in its most literal import means nothing but stamping with a device. Any material, therefore, which can be stamped may be coined. And in that sense any impressible material, even paper, is susceptible of literal coinage. But the true construction unquestionably is, that the more common mode of creating money is here, by a figure of speech, put for the whole, and that "coining" money means nothing more than *making* money. For unless we do adopt this construction, there is no power by which money of gold and silver can be made in any other mode except coinage. It could not be done by weight, in the form of bars or bullion, or by stamping pieces of gold or silver, short of coinage, or by any other known or newly-discovered device. Such a narrow and literal construction

of language would never be adopted in regard to the interpretation of other written instruments. The *endorsement* of notes and bills, which literally imports an assignment upon the *back* of the instrument, may just as well be upon the face of the instrument, as has been often decided. So also a contract for the *manufacture* of cloth, or machinery, or any other thing, where it was susceptible of being done, either by hand, as the word literally imports, or by machinery, would never be received in a strict literal sense. All that is implied is, that it shall be so made as to answer the ordinary purposes and objects of such fabrics in the market. These illustrations might be carried to any extent. Any court which should assume to give language any such literal construction, in regard to an incidental and collateral matter, only implied from the etymology of the terms used upon any other subject, would shock the common instincts and common sense of mankind. And why that strict and extremely literal construction of this clause of the Constitution should be so strenuously insisted upon on this subject, any more than upon other portions of the instrument, is not easily explainable. If one of the most accurate of English writers could speak of "coining blood for drachmas," why may not a nation coin money in all the modes known at the time the power is created, and thus stamp its own paper with the quality of lawful money? Few men will argue that the government might not stamp the quality of money upon gold and silver without literally coining it, and if so, why may it not effect the same thing with its own paper, as no limitation is found, surely, in regard to the material of which money shall be made by the national authority? It may be of any metal or other material susceptible of coinage. The same thing may be effected by stamping such material. Is paper, therefore, certainly excluded? Can that be fairly said when it was one of the known modes of making money at the time, and present to the minds of the framers? If money may be coined out of paper, it is surely none the worse for containing the promise of the government.

It may undoubtedly be fairly argued that this power of emitting bills of credit and stamping them with the qualities of lawful money, was not intended to be given as the ordinary mode of making money. It was not expected the nation would attempt to do, under ordinary circumstances, what all nations regarded as destructive policy, except in times of war or extreme emergencies. The same is true of borrowing money, which is one of the express

powers granted in terms most unquestionable. No nation can borrow money for its ordinary current expenses and not come to ruin and bankruptcy, any more than an individual could do the same and not lose credit. Current expenses must be met by current income or all credit and character is lost, both personal and national.

To argue that no power to emit bills of credit and stamp them as lawful money was intended to be given to the nation, but that still this may be done in all great emergencies, when it is impracticable to maintain the national life in any other way, seems to us very nearly equivalent to saying that the power is not given at all as an ordinary function of government; but it may be resorted to, by way of spasmodic convulsion, in the last throes of existence! This seems to be an admission that it is not given but may be assumed *in articulo mortis*, the same as the people may resort to the inherent right of revolution when the oppressions of the existing government become intolerable! This is a species of legal construction not judicial in its character as it seems to us. We would sooner presume it, as a necessary incident of national sovereignty.

Such an argument seems to us rather political than legal; a function of the legislative or executive authority, rather than of the judiciary. If the power to emit bills of credit and stamp them as money is not given in the function of borrowing money and coining money, it seems to me, with submission, that it is not given at all. But it seems very clear to us that these express powers of borrowing money and making money must be supposed to have been given to be exercised, not only in all the then known and usual modes of doing those things, which will cover the present issue of treasury notes, but also in all future modes and emergencies which might be desirable as they should arise. This is the only mode of construing the Constitution which will make it answer the purpose of its adoption. Upon any other mode of construction a written constitution must become an intolerable hamper and impediment to the just development and growth of the national life, which should surely be avoided if the courts possess the power of rising to the demands of the exigencies of advancing time, which is one of the indispensable functions of judicial construction, and which can alone render written laws enduring.

I. F. R.